



Office of Command Counsel Newsletter

February 1998, Volume 98-1

Commercial Activities Workshop Plans Our Future

The AMC legal community played an important role in the first conference devoted to the critical issue of Commercial Activities, Privatization, Outsourcing, and Contracting Out.

Hosted by TECOM and sponsored by the AMC Deputy Chief of Staff for Engineers, the workshop was attended by 225 individuals from various AMC organizational elements, as well as HQ, DA, Army Audit Agency, TRADOC, Corps of Engineers and others.

Charles Foster, AMCEN, is to be commended for his work in bringing all the pieces of the workshop together. **Elizabeth Buchanan** and **Cassandra Johnson** made well-received presentations, and a paper written by **Linda Mills** significantly contributed to the program.

Enclosed is a copy of the Workshop agenda (Encl 1). Additionally, we provide a copy of **Cassandra Johnson's** outline "Labor Relations and Contracting Out — Reversing the Tide" (Encl 2) and **Linda Mills'** paper addressing the la-

bor relations legal issues related to contracting out (Encl 3). **Fred Moreau**, OTJAG's Labor Advisor, gave a presentation entitled "Privatization and Outsourcing: Everything You Wanted to Know But Were Afraid to Ask". A copy of his briefing charts are available from **Cassandra Johnson**, DSN 767-8050.

There were two exceptional panel discussions, one comprised of General Accounting Office experts and another with a joint Congressional staff and business community focus.

Contracting out, privatization, outsourcing and the umbrella issue of commercial activities will continue to provide challenges throughout AMC and to the AMC legal community. It is important that AMC field and HQ counsel communicate and coordinate on all specific matters relating to the commercial activities area.

For more information on this important workshop contact **Cassandra Johnson**.

Seven Years Without An Itch

Welcome to the 7th--yes, the 7th year of the AMC Command Counsel Newsletter. We have kept to a bi-monthly publication schedule, making this issue our 37th. During this time our editor, **Steve Klatsky** has worked diligently to ensure that each edition contains information of both a substantive and personal nature. We are a closer legal community and family because of these tireless efforts.

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Untangling the Web

Allergic to dusty old books or suffer from claustrophobia when in crowded book stacks? Why not point and click to receive all sorts of great information to make you either a smarter lawyer, better conversationalist, or both?

On the Office of Command Counsel Home Page click on the Federal Web Locator, with links to all sorts of great sites. For example, OPM's Dealing With Workplace Violence: A Guide for Agency Planners, or the Library of Congress for an up-to-date list of all current legislation in both the House and Senate.

Many of our AMC attorneys have taken the time to bring various web sites to the attention of editor **Steve Klatsky**. These includes the following:

- o Free weekly FEDweek newsletter available to any federal employee: www.fedweek.com. For example, the January 14 edition contained articles on the Thrift Savings Plan developments, free leave chart, defense panel on DoD contracting, DoD firefighter jobs, and Congress returning to session. Thanks to **Stan Citron**, HQ AMC.

- o Acquisition attorneys may want to bookmark www.gpo.gov

University's web site <http://www.law.gwu.edu/burns>.

Be sure to scroll down to "Government Contracts Resource Guide" for a complete list of useful on-line research links (e.g., various legislative, executive, and judicial branch links, as well as links to some on-line periodicals). **Patricia Tobin**, one of the three GW law librarians that created this guide, asks government contracts practitioners for feedback, as well as for links to other useful sites not listed in her guide. Ms. Tobin's e-mail address is ptobin@main.nlc.gwu.edu. Thanks to CBDCOM's **Lisa Simon**.

- o TACOM's completely revised Public Homepage has several unique items such as listing AMC legal offices and a Legal Links legal research web directory: www.tacom.army.mil/legal/cctop.htm. Thanks to TACOM's **John Klecha**.

- o Supreme Court business can be tracked through the Cornell University web site: <http://supct.law.cornell.edu/supct>. Thanks to HQ AMC's **LTC Paul Hoburg**.

- o The Office of Personnel Management website is linked to the AMCCC Labor and Employment Law Team thanks to **Linda Mills**. <http://www.opm.gov>

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The AMC Command Counsel Newsletter is published bi-monthly, 6 times per year (Feb, Apr, Jun, Aug, Oct and Dec)

Back Issues are available by contacting the Editor at (703) 617-2304.

Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to sklatsky@hqamc.army.mil

Check out the Newsletter on the Web at http://amc.citi.net/amc/command_counsel/

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

Printing Business Cards with Gov't \$ ---A Funding Issue (Of Course)

*We got
Regs for
you!*

MAJ Cindy Mabry, HQ AMC, DSN 767-2301, has prepared a point paper providing information about the current rules for printing business cards, and possible future policy changes (Encl 4).

Army policy, as articulated in Army Regulation 25-30, prohibits printing business cards using appropriated funds. Following direction from the Joint Committee on Printing in Congress, and consistent with long standing Comptroller General opinions, the Army policy's only exceptions are business cards for military and ROTC recruiters, and contact cards for Army EOD units.

Recently, a Department of Justice (DOJ) Memorandum concluded that the purchase of business cards for agency employees who deal with outside organizations may be a proper expenditure from an agency's general appropriations.

The DOJ Memorandum noted that while Comptroller General opinions are useful,

they are not binding upon agencies in the executive branch. Thus, pursuant to the DOJ Memorandum, agency needs may determine whether the use of such cards would carry out the purpose of an appropriation.

It must be remembered that the Army policy set forth in AR 25-30 currently remains in effect, and must be followed, until such time as the policy is changed, or unless exceptions are granted on a case by case basis. AMC is now in the process of requesting the expenditure of appropriated funds for printing business cards for official purposes. In the meantime, Army Standards of Conduct Office (SOCO) guidance on the use of Government computers to print business cards may be helpful. SOCO has stated that such use of government resources is acceptable, when authorized by the appropriate supervisor, if the employee provides his or her own card stock, and if the purpose of the cards is to enhance the employee's job performance.

Armey Regulation 5-20, Commercial Activities Program, is now final and in effect. It is being published and should be available shortly. Also, the 1998 DOD Authorization Act, Section 384, dropped the threshold for Congressional notification for most comparison studies to studies of more than 20 Full Time Equivalent (FTEs). The POC for this subject is either **Cassandra Johnson**, DSN 767-8050 or **Elizabeth Buchanan**, DSN 767-7572.

The Cost Comparability Handbook is being re-written after the Air Force C-5 maintenance competition. This Handbook is used for public-private competitions involving depot maintenance. The current and probably final draft permits demonstrated cost savings from better use of capacity to be a cost factor, and addresses cost of money and income tax impacts. As this area continues to grow in importance it should be a mandatory part of your library. The POC for this subject is **Ms. Elizabeth Buchanan**, DSN 767-7572.

Fighting Fraud: A Primer on *Qui Tam* Suits Civil War Statute Saw the Future

C ECOM Fraud Advisor **John Eckhardt**, DSN 992-9833, provides an excellent paper on *Qui Tam* suits — where a third party brings suit against a contractor (Encl 5). In a *Qui Tam* suit, an individual brings an action in federal District Court, on behalf of the *United States*. Since these suits are community brought alleging some sort of fraud, waste or abuse, they are commonly referred to as “whistleblower” suits.

Qui Tam suits are authorized by statute in certain cases, such as fraud against the United States. The *Qui Tam* action dates back to the Civil War era, when there was rampant fraud by businesses supplying war materials to the Federal Government. The existing Federal law enforcement and judicial structures were not equipped to address the magnitude of the fraud problem that the Government

facied. In an attempt to deal with this problem, Congress authorized individuals to bring legal suits against people who had defrauded the Government.

Motivation to bring a *Qui Tam* suit covers all human emotions, such as a sense of civic duty, or a sense of indignation that the Government is being cheated. There are other, more tangible motivations for such a suit. First, such are often brought by a disgruntled contractor employee or former employee, who sees a *Qui Tam* suit as an avenue for airing grievances against the former employer. Such suits usually also include a suit for wrongful termination, unrelated to the alleged fraud. The biggest reason, however, for bringing a *Qui Tam* suit is the potential for monetary award. Persons bringing such suits, called relators, are entitled to percentages (usually between 15 and 25 percent) of any

damages recovered by the Government as a result of the suit, as well as their costs and attorney fees.

There are some limitations to bringing a *Qui Tam* action. Members of the Armed Forces are barred from bringing such suits based on facts or knowledge arising out of their official duties. Civilian Government employees, while not barred from bringing such suits, face a variety of procedural and circumstantial hurdles before they may be considered proper *Qui Tam* relators. *Qui Tam* suits may not be based on information publicly disclosed, *unless* the relator was the original source of the Government or public information. What constitutes “publicly disclosed” is a complex analysis, and generally includes most instances where the Government was already aware of the fraud.

Contractors on the Battlefield: Bridging Gaps in the Deployed Force Structure

On 12 December 1997, DA issued policy addressing many questions related to the role of contractors on the battlefield. In addition to firmly stating that contractors would generally be utilized above division but could be employed at lower echelons at the determination of the senior military commander, the policy memorandum also identifies a series of factors to be addressed during the negotiation and drafting of any contract which may place contractors in a deployed situation.

The policy memorandum is jointly signed by **Kenneth J. Oscar**, Acting Assistant Secretary of the Army (Research, Development, and Acquisition), and **Alma B. Moore**, Acting Assistant Secretary of the Army (Installation, Logistics and Environment). POC's are **LTC Paul Hoburg** at DSN 767-2252 and **MAJ Cindy Mabry** at DSN 767-2301.

Contractors are required to perform all tasks identified within the Statement of Work (SOW) and all other provisions defined within the con-

tract. Contractors will comply with all applicable US and/or international laws. During a declared war, civilian contractors accompanying the US Army may be subject to the Uniform Code of Military Justice (UCMJ).

When US contractors are deployed from their home stations, in support of Army operation/weapon systems, the Army will provide or make available, on a reimbursable basis, force protection and support services commensurate with those provided to DOD civilian personnel to the extent authorized by law. These services may include but are not limited to non-routine medical/dental care; mess; quarters; special clothing; equipment; weapons or training mandated by the applicable commander; mail; and emergency notification. Planning must be accomplished to ensure agreed upon support to contractors is available to the responsible commander.

Among the factors that must be considered during the negotiating and drafting of any contract that requires the deployment of civilian con-

tractors to support US Army operations/weapons systems:

- o Areas of deployment (to include potential hostile areas) and their associated risks.

- o Physical/Health limitations that may preclude contractor service in a theater of operations.

- o Contractor personnel reporting and accountability systems to include plans to address contractor personnel shortages due to injury, death, illness, or legal action.

- o Specific training or qualification(s) that will be required by civilian contractors to perform within a theater of operations, e.g., vehicle licensing, NBC, weapons.

- o A plan to transition mission accomplishment back to the government if the situation requires the removal of contractors.

- o When Status of Forces Agreement (SOFAs) do exist, they may not specifically address the status of contractor personnel. Contractor personnel stance will depend on the nature of the specific contingency operations and those applicable SOFA provisions.

Acquisition Law Focus

Certifying Officials Need to be Careful...Real Careful

Diane Travers, HQ, AMC, DSN 767-7571, provides a 10 December 1997 memorandum from AMCRDA, subject: AMC Policy in Support of the Rights and Responsibilities of IMPAC Certifying Official (Encl 6). Because of a recent change in law, certain officials who approve IMPAC card purchases must be designated as certifying officials. These officials may be held pecuniarily responsible for the costs of any purchases they certify for payment that may later be determined improper or illegal.

Pursuant to the provisions in DOD 7000-14-R, Vol 5, Chapter 2, paragraph 0212, a certifying official's liability is "strict and automatic," and they are assumed to be liable until they can prove otherwise - 31 USC Sec. 3527b. This means that these individuals are pecuniarily liable for the costs of any purchases they certify for payment which may later be determined improper or illegal. DoD Financial Management Regulation, Volume 5, Appendix C, paragraphs C104 indicates that certifying officials are insurers of the public funds in their custody and

are excusable only for losses due to acts of God or the public enemy.

Certifying officials are, however, able to seek relief from Defense Finance and Accounting Service (DFAS), or the Comptroller General, per the same DoD Financial Regulation and law, so long as the payment is based on official records and the official could NOT have been reasonably expected to discover the correct information, or the payment was made in good faith, was not prohibited by law and the Government received value for the payment.

Certifying officials have the responsibility to know the policy concerning what is prohibited from IMPAC purchase and what is allowable for purchase. This includes but is not limited to Army Federal Acquisition Regulation Supplement 13-90, the General Services Administration Government wide Commercial Credit Card Service Contract Guide, the Standard Army Business Practices, HQ, DA and HQ, AMC developed policies and internal agency procedures. Ignorance of the policy is not an acceptable excuse for avoiding "pecuniary liability."

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2. Labor Relations and Contracting Out
3. Labor Law Contracting Out issues
4. Printing Business Cards—A Funding Issue
5. Qui Tam Suits
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7. Performance Specs and the Government Contractor Defense
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13. Powering Down Utilities—ACSIM Policy
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16. Environmental EOs
17. ELD Bulletin Dec 1997
18. ELD Bulletin Jan 1998
19. General Wilson on Ethics
20. Ethics Advisory on Gifts and Travel
21. Travel Memo

Performance Specs and the Government Contractor Defense

Sandy Biermann from IOC, DSN 793-7891, addresses an important question: Whether contractors bear an increased liability risk as we shift from manufacturing to design specifications to manufacturing to performance specifications. The not so surprising answer is probably: Some argue that by their very nature, performance specifications may threaten the availability of the so-called "Government Contractor Defense" to tort liability, thus leaving contractors more vulnerable to product liability suits.

Under the "Discretionary Function" exclusion to the Federal Tort Claims Act (FTCA), the federal Government cannot be sued for the negligent acts of government employees when those acts involve policy judgments and decisions in which there was a weighing of competing concerns. Ordinarily, this exclusion from liability would leave the contractor as the sole target of a lawsuit, but under certain conditions the "Government Contractor Defense" protects the contractor who shared in the Government's discretionary decision-making. In Boyle v.

United Technologies the Supreme Court outlined the elements of the defense as follows: (1) the Government approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the Government about the dangers in the use of the equipment that were known to the supplier but not to the Government. (108 S.Ct. 2510, 1988.).

In order for a contractor to be shielded from liability for its negligence, the Government must exercise the discretion, not the contractor. In Trevino v. General Dynamics Corp., the court held that the defense "protects government contractors from liability for defective designs if discretion over the design feature in question was exercised by the government ... mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on substantive review and evaluation of the contractor's choices." (865 F.2nd 1474, 5th Cir. 1989.). In Kleeman v. McDonnell Douglas Corp., the court noted that it is ex-

tensive government involvement in the design process which "provides tangible evidence of the strong federal interest which justifies the creation of a federal common law defense for government contractors in the first place." (890 F.2d 698 (4th Cir. 1989.).

Whether deleting design specifications effectively eliminates the Boyle defense is a controversial issue not yet fully addressed by the courts. Experts differ on the potential liability increase. Pentagon acquisition reform chief **Colleen Preston** didn't believe this issue would have a substantial impact. (See: "Is a Risky Business Getting Riskier?", Defense Week, May 15, 1995.). She argued that in most cases companies were liable and Boyle didn't apply;

An inherent factor in the shift to performance specifications is that contractors may be more vulnerable to product liability claims; that may well be one of the factors driving the change. This article contains a debate between Ms. Preston and contractor counsel that frames the issue and impact (Encl 7)

Employment Law Focus

CSA on Considering Others

AMC Chief of Staff **James Link** provided HQ AMC employees with a recent statement from General **Dennis J. Reimer**, concerning the results of the Secretary of the Army Senior Review Panel, one of the most comprehensive studies ever done on the human relations climate in the Army (Encl 9)

One of the developments is a Consideration of Others Handbook. MG Link states that the essence of this program is for you to assess and improve the organizational climate of your command, both your military and civilian work force.

The handbook has sections on the concept of operation, several specific focus areas and lesson plans. The Equal Employment Opportunity Advisor is key to the successful implementation of the Consideration of Others program. A videotape has been produced, and training will be executed by the DoD Equal Opportunity Management Institute.

The handbook can be viewed in the DA DCSPER Home

Page: www.odcsper.army.mil

February 1998

Firm Choice Still Around

Agency practitioners breathed a sigh of relief two years ago when it appeared that the MSPB and the EEOC were both now in agreement that the law did not require “firm choice” between rehabilitation and discipline. You were cautioned that agencies could voluntarily provide for “firm choice” in its agency regulations.

In Humphrey v. Department of the Army, 97 FMSR 5417 (Sept 26, 1997), the MSPB determined that the Army failed to act in accor-

dance with its own regulations on the treatment of alcoholism. Under provisions in AR 600-85, the DA adopted the view that it would accommodate an employee’s disability by holding discipline in abeyance while providing the appellant 90 days to seek rehabilitation, and to forbear from imposing the suspension if the appellant should demonstrate success.

The obvious practical point is that the issue of “firm choice” is subject to case law and specific agency regulations.

Rights Act Damages Covers Entire Claim

The U.S. Court of Appeals for the Sixth Circuit has ruled that the \$300,000 damage cap under the Civil Rights Act of 1991 applies to an entire claim filed under Title VII, rather than to every separate claim of discrimination, Hudson v. Reno, No. 96-5232, Dec. 4, 1997.

The court stated that the plain language of Section 1981a applies to “an action brought by a complaining party” and that \$300,000 is the maximum that may be recovered by “each complaining party” against a “respondent

that has engaged in unlawful intentional discrimination.” It rejected plaintiffs’ argument that under the damages provision of the Act, she is entitled to recover up to \$300,000 on each of her separate Title VII claims of sex discrimination, retaliation, and constructive discharge. The Court ruled that the “Friend of the Court” brief filed by the Equal Employment Opportunity Commission was entitled to no deference when it was clearly at odds with the statute.

High Court Finds **No** Right to Lie

In a long-awaited ruling the U.S. Supreme Court ruled unanimously that federal workers who deny a job-related misconduct charge can be separately charged and disciplined for lying.

In Lachance, Acting Director, OPM v. Erickson, No. 96-1395, January 21, 1998, the Court held that neither the fifth amendment's due process clause nor the Civil Service Reform Act, 5 USC Sec 1101 et seq, precludes a federal agency from disciplining an employee for lying during an agency investigation.

Erickson, a police officer with the Bureau of Engraving and Printing, was investigated as part of an agency effort to discuss who was making harassing telephone calls. Erickson denied any and all knowledge. It was eventually discovered that Erickson had encouraged others to make these calls. The Bureau fired Erickson for his part in the incident and for lying about it.

On appeal, the Merit Systems Protection Board and the Federal Circuit both ruled that the false denial could not be considered in setting an appropriate penalty. The Supreme Court rejected, on both precedent and principle, the

Federal Circuit's view that a "meaningful opportunity to be heard" includes a right to make false statement with respect to the charged misconduct:

It is well established that a criminal defendant's right to testify does not include the right to commit perjury, e.g., Nix v. Whiteside, 475 U.S. 157, 173, and that punishment may constitutionally be imposed, e.g., U.S. v. Wong, 431 U.S. 174, 178, or enhanced, e.g., U.S. v. Dunnigan, 507 U.S. 87, 97, because of perjury or the filing of a false affidavit required by statute, e.g., Dennis v. U.S., 384 U.S. 855. The fact that respondents were not under oath is irrelevant, since they were not charged with perjury, but with making false statements during an agency investigation, a charge that does not require sworn statements. If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. See, e.g., Hale v. Henkel, 201 U.S. 43, 67. An agency, in ascertaining the truth or falsity of the charge might take that failure to respond into consideration, see Baxter v. Palmigiano, 425 U.S.

308, 318, but there is nothing inherently irrational about such an investigative posture, see Konigsberg v. State Bar of Cal., 366 U.S. 36, Pp. 2-5.

Where We Retire

The National Association of Retired Federal Employees reports that Federal employees retire to many interesting places outside the US. For example, in October 1997 annuity checks were mailed to

Ukraine	3
Peru	68
Romania	13
Serbia	133
Poland	92
Canada	1,956
Hungary	27
Mexico	377
Israel	200
Japan	975
Australia	188
India	816
Greenland	60
France	187
Germany	1,387
Hong Kong	77

And, one each in Vietnam, Qatar, Albania, Eritrea, Argentina, Senegal and Guinea-Bissau.

Happy Retirement.

Defense Authorization Act on Personnel, Depot Mgmt & Acquisition Issues

The Defense Authorization Act for FY 1998 addresses many important civilian personnel issues. Perhaps the most critical is Section 357, which amends 10 USC 2466(a), increasing from 40% to 50% the share of depot level maintenance and repair workload that may be performed by the private sector.

The legislation also prohibits the management of depot-level maintenance and repair employees by any demonstration of man years, end strength, full-time equivalent positions, or maximum number of employees (Section 360).

The Secretary of Defense is required to designate each depot-level activity as a Center of Industrial and Technical Excellence in the core competency of the activity; requires reengineering of industrial processes; adopts a best-business practice requirement at depot activities in connection with core competency requirements; and, allows Centers to enter public-private relationships.

The statute at Section 591 contains an important

sexual harassment provision. It amends Title 10 to add section 1561. 10 U.S.C. section 1561 obligates commanders to take certain actions upon receipt of a complaint from a member of the command or a civilian employee under the commander's supervision that alleges sexual harassment by a member of the armed forces or a DoD *civilian employee*. 10 U.S.C. section 1561 includes a definition of sexual harassment similar (but not identical) to the definition in DODD 1350.2 and AR 600-20. This new statutory definition is broader than the Title VII definition of sexual harassment. It covers condemnation by persons in supervisory positions and deliberates or repeated unwelcome gestures or comments of a sexual nature in the workplace by any member of the armed forces or DoD civilian employee, whether or not such activity creates a hostile work environment or adversely affects the victim's ability to perform his or her job.

Section 911 amends Title

10 to add section 130a. 10 U.S.C. section 130a requires a 25 percent reduction in the number of personnel assigned to management headquarters and headquarters support activities phased in over 5 years.

Section 912 requires a reduction of 25,000 in the number of defense acquisition positions in FY 1998. The Secretary of Defense is authorized to waive up to 15,000 of that number if the Secretary determines and certifies to Congress that a greater reduction would be inconsistent with cost-effective management and would adversely affect military readiness.

Encl 10 contains an in-depth summary of these and other provisions.

More on the Defense Authorization and Appropriations Acts in later Newsletter editions.

Employment Law Focus

OPM to Issue LMR Advisories

To provide labor-management relations specialists with information about Federal labor-management relations, OPM will be issuing, on a nonscheduled basis, Labor-Management Relations advisories that are designed to convey information in a more timely and flexible manner.

After announcing this system, OPM issued its first advisory, the subject of which is the labor-management relations implementations of OPM's revised reduction in force regulations, Labor-Management Relations Advisory #97-2, Dec. 4, 1997

This advisory discusses new options available for adding service credit for particular performance ratings, and advises readers on the current requirements regarding possible conflicts between existing collective bargaining agreement provisions and a new government-wide regulation.

DA EEOCRA Issues EEO-Labor Relations Policy Covers Official Time & Union Rep Standards

Stanley L. Kelley, Jr., Director, Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCRA) issued an important policy statement to all DA EEO Officers, stating that union officials or members may be designated as a complainant's representative.

The policy encourages consultation with legal and CPO to determine when such representation would be a conflict of interest with the official or collateral union duties of such designated representative. For example, a Union president may not represent a supervisor if he/she supervises a person who encumbers a position in the bargaining unit. In this circumstance the Union president may be disqualified due to conflict of interest. This important policy also addresses other issues:

- o Time used by a union official or union member in representation of the complainant in administrative EEO complaint process cited in 29 CFR Part 1614 is not to be considered nor computed as "official time" within the confines of "official time" as stated in 5 USC Section 7131

unless a negotiated labor-management agreement includes EEO representation as official time under section 7131.

- o While on duty and otherwise in a pay status, a reasonable amount of official time, as defined in EEOC's EEO Management Directive 110, is permitted by a management official. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the agency's mission and the agency's need to have its employees available to perform their normal duties on a regular basis.

- o No award of attorney's fees is allowable for the services of any employee of the federal government.

Enclosure 11 contains the EEOCRA edict.

Can your drinking H2O pass the test?

The Safe Drinking Water Act Amendments of 1996, made substantial changes to the basic Safe Drinking Water Act, including expanding the waiver of sovereign immunity. Under section 1447 of the Act, as amended, 42 U.S.C. 300j-6, federal facilities are now subject to enforcement actions by EPA, state and local authorities, and sanctions including penalties. One of our installations is currently responding to an EPA enforcement action and proposed \$600K penalty for alleged SDWA violation. Environmental Law specialists need to reaffirm to installation personnel the need to comply with federal and state safe drinking water requirements. Guidance on the changes made by the 1996 Amendments is provided in Enclosure 12.

Medical Wastes--Handle Correctly

The Medical Waste Tracking Act of 1988 (MWTa), established a two-year EPA administered demonstration program in certain coastal states to improve the proper management of medical wastes. It contained a very expansive waiver of sovereign immunity, 42 U.S.C. 6992e(a). While it could be argued that this expansive waiver is no longer valid upon expiration of the demonstration program, in many states the management of medical wastes is part of the state's solid waste management requirements and thus subject to potential state and local penalties pur-

suant to the general waiver in the Solid Waste Disposal Act, 42 USC 6961. A local jurisdiction recently attempted to impose a \$5000 penalty against a post Hospital for violation of local medical waste regulations. Hospital and medical personnel should be reminded to comply with any local regulations for the proper management of medical wastes. More information and a copy of an article, State Regulation of Military Medical Waste-Has Sovereign Immunity Been Waived? can be obtained by contacting **Bob Lingo**, DSN 767-8082.

Powering Down: Getting Out of the Utility Business

As a result of the Defense Reform Initiative, the Assistant Chief of Staff for Installation Management has directed that by 1 January 2000 installations privatize all utility systems (electric, water, wastewater, and natural gas) except those needed for unique security reasons or when privatization is uneconomical. Privatization of utility services at active installations involves acquisition, environmental, and real estate issues. AMC attor-

neys must be involved in developing the required implementation plans to meet the 2000 goal. The ACSIM policy and procedures for privatization of utility systems is at Encl 13, and real estate guidance for transferring ownership at Encl 14. Both documents and current guidance on outsourcing and privatization, including utility privatization, can be obtained from the ACSIM Home Page, <http://www.hqda.army.mil/acsimweb>.

Environmental Law Focus

The President Speaks Again-- Environmentally Related EOs

The December 1997 edition of the Newsletter contained a list of some of the more recent or well-known environmental Executive Orders. Our legal office at CBDCOM has expanded the list, and provided a summary of each executive order or directive, Enclosure 16. Thanks! Your products will be useful to all!

Contracting for Environmental Remediation

Can we lower costs and achieve greater efficiency by contracting for environmental remediation? The issues and problems raised by this approach are addressed in a paper prepared for The Judge Advocate General's School 1997 Contract Law Symposium, entitled *Some Issues Regarding "Privatization" of Environmental Remediation Work* CC Newsletter

Letting Others Use Our Facilities

With decreasing mission activities and tight budgets, it is crucial that the Army lease vacant or underutilized facilities to non-Army entities, to lower maintenance costs and maintain the facilities in good condition. However, proposed leasing actions must comply with the National Environmental Policy Act (NEPA) and meet other environmental requirements. The Industrial Operations Command and our legal office have compiled a guidance document to assist in writing and reviewing an Environmental Assessment for these real estate actions. If you would like a copy contact **Bob Lingo** or **Stan Citron**.

In addition to NEPA compliance, Army policy in most cases requires a Finding of Suitability to Lease and an Environmental Baseline Survey, per AR 200-1.

ELD Bulletins for Dec '97 & Jan '98

Environmental Law Division Bulletins for December 1997 and January 1998 are provided (Enclosures 17 and 18) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version.

New JAG Team Visits AMCCC

On 14 January 1998, the Office of Command Counsel had the pleasure of hosting **MG John Altenburg**, The Assistant Judge Advocate General, **BG Michael Marchand**, Assistant Judge Advocate General for Civil Law and Litigation, **Robert Kittel**, Chief, Regulatory Law Office, **COL Richard Rosen**, Chief, Personnel Plans and Training Office, and **LTC Janet Charvat**, Office of The Judge Advocate General.

In addition to a courtesy call with Chief of Staff **MG James Link**, **Ed Korte** chaired a series of briefings by **Nick Femino**, **Colonel Bill Adams**, **Bob Lingo**, **Stan Citron**, **Steve Klatsky**, **Elizabeth Buchanan**, **Diane Travers**, **LTC Paul Hoburg**, **MAJ Cindy Mabry**, **Craig Hodge** and **Bill Medsger**. A copy of the complete agenda is enclosed (Encl 8).

AMC attorneys and JAGC Counsel enjoy an excellent relationship, an acceptance of joint objectives, and a recognition that mutual support contributes to the success of each organization.

We look forward to working with the new JAG team under the leadership of **MG Walter B. Huffman**, The Judge Advocate General.

The Y2K Problem or the Millenium Bug

AMCOM's **Dalford R. Widner**, DSN 788-0532, provides an interesting and very readable article on a subject that we have all heard about: what happens to our computers on 1 January 2000 (Encl 15). Some dramatic statistics or at least estimates of the magnitude of the problem:

- o Repair costs exceeding \$2,000 for every working person in the US

- o OMB estimates \$3.8 billion to fix the problem.

- o American Bar Association projects cost of business disruptions and legal costs could reach a trillion dollars.

And....

The "imbedded chip" problem caused, so says the Government Computer News, the DoD Global Command and Control System to crash during a Joint Warrior Interoperability Demonstration.

The General Accounting Office released a report (GAO T-AIMD-97-129) titled "Time is Running Out for Federal Agen-

cies to Prepare for the New Millennium." The report outlines a five phase OMB strategy of best practices for addressing the Y2K problem.

All the information in this fascinating article was downloaded from the Internet. For example, the Army Year 2000 homepage at <http://imabbs.army.mil/army-y2k>.

Dal ends his article on a happy note: "As for me, I'm not worried. After all on 28 December 1999 I will be 60 years old, having been born in 1939. On 1 Jan 2000 I will be only 39 (00-39=39) and since my computer tells me it is a Monday, I will be especially happy that it is a holiday and I don't have to work."

Chain, Chain, Chain or We Get Lots and Lots of Letters

We know that it is a misuse of Government resources for an employee to use his or her Government computer, LAN and Internet access to send electronic chain letters. But what about unsolicited chain letters that an employee might receive on his or her Government computer?

Recently, an employee in HQ, AMC received a chain letter via e-mail addressed to his AMC e-mail account on his Government computer. It did not originate from any USAMC or other Government computer. Like most chain letters, it promised riches (\$55,000 to be exact) for a modest investment of time and money (\$20). It was thinly cloaked as a multi-level marketing scheme involving the sale of various financial reports. But our AMC employee did not jump at this opportunity and decided to keep his \$20.

But he was understandably irate at receiving it here, on the job, on his Army computer. In his frustration, he e-mailed the Command Counsel's office and asked if this wasn't illegal, and couldn't we help him.

Although we were not able to satisfy the employee with summary execution and disposal of the offending source of the electronic chain letter, here is what we advised him. This might help you deal with a similar problem if it arises within your organization. The fact of the matter is that there is not a lot that we can do about unsolicited "spam" from outside the Government, whether it comes by snail mail or electronic mail.

Ethics Counselor **Mike Wentink**, DSN 767-8003, concluded that there is not much that can be done other than hit the delete button, especially since the sender was not an AMC employee. The USPS webpage does contain some advice to some recipients of chain letters. Check out <http://www.usps.gov/websites/depart/inspect/chainlet.htm>

The last paragraph of the USPS webpage on chain letters says: "Turn over any chain letter you receive that asks for money or other items of value to your local postmaster or nearest Postal Inspector. Write on the mailing envelope of the letter or

in a separate transmittal letter, 'I received this in the mail and believe it may be illegal. I received this by electronic mail, it involves the use of the U.S. Postal Service, and I believe that it may be illegal.' If you wish to do this, your supervisor may permit you to print this chain letter using your Government computer and printer.

Another approach is that you might reply to the sender and ask to be removed from her mailing list, advising her that she is sending this chain letter solicitation to a Federal electronic mail address. However, while this will work with a legitimate organization, don't know how successful you will be here.

Still another approach that the HELPDESK might explore is the use of FILTERS to eliminate unwanted "spam." This might cause more trouble than it is worth, e.g., catching and eliminating otherwise valid communications. I think that there are also places on the Internet where such unwanted "spammers" can be reported. **Mike Wentink** would be interested in any other ideas you have.

General Wilson on Ethics

The AMC Commander, General **Johnnie E. Wilson**, issued a policy statement on ethics to the AMC work force on 8 January 1998. In this memorandum, the CG states that

“Ethics is the backbone of the U.S. Army Materiel Command’s mission and vision. Ethics is that core value by which we establish respect, confidence, and trust among ourselves, with our contractors, and with the American taxpayer.”

General Wilson reminds AMC personnel that Ethics Counselors in AMC legal offices are responsible for our ethics training, advice and counsel. He highlights the need to attend training, to file timely financial disclosure reports, and to be particularly aware of and sensitive to the rules concerning gifts.

Importantly, the CG asks that you seek advice and counsel **before** you act.

The memorandum concludes with this statement by the CG: “We exist to support the soldier. Ethics is the linchpin by which we are able ultimately to accomplish this mission.” Enclosure 19 contains this important memorandum.

Ethics Advisory: Gifts & Official Travel

HQ AMC’s **Mike Wentink** recently sent an ethics advisory to all HQ, AMC employees, an excellent preventive law technique that is sure to increase awareness (Encl 20)

What if an outside source, such as a contractor or professional association, offers to pay some or all of your official travel expenses (including free attendance) to some event?

Can you accept them? Perhaps. There is a statute (31 U.S.C. Sec. 1353) that authorizes the acceptance of such gifts. But, there are rules, conditions and restrictions.

- o Never solicit!
- o If an outside source offers to pay you may not accept unless all of the following exist:

1. You must be in an “official” travel status.
2. Your travel must be to a meeting or similar event (as opposed to mis-

sion accomplishment), such as a seminar, symposium, or training course.

3. Your travel approving authority must approve in writing your acceptance of the gift on behalf of the Army after doing a conflict of interest analysis

4. Your Ethics Counselor concurs in the approval.
 - o If approved:

1. Payment in kind is preferred.

2. Never accept cash!
3. If reimbursement is by check, have it made payable to Department of the Army .

4. If value of gifts exceeds \$250, you must submit a report to your Ethics Counselor. It will be forwarded to the Office of Government Ethics where it will be made available for public inspection.

Further information is provided in the enclosed Memorandum for Traveling the USAMC Employees (Encl 21).

Faces In The Firm

Arrivals

AMCOM

In October, ATCOM and MICOM merged to form AMCOM. The following personnel relocated from St. Louis to Redstone Arsenal: **Jeffrey L. Augustin, Christopher G. Barrett, H. Bruce Bartholomew, Charles H. Blair, Mary A. Claggett, Bruce F. Crowe, CPT Scott G. Gardiner, Robert H. Garfield, M. Bruce Jones, Robert L. Norris, Tina M. Pixler, Harvey Reznick, Lawrence A. Runnels, Suzanne B. Simmons, Arthur H. Tischler, Brian E. Toland, Tony K. Vollers, and CPT Christopher J. Wood.**

LT Jeffrey M. Neurauter joined the office in the Acquisition Law Division. He is currently attending the Basic Course at TJAGSA, to return in April.

LT Martin N. White joined the Office of SJA in October. He was promoted to Captain on 1 January 1998.

WSMR

Welcome back to paralegal **Denise Judd**, who returned to work after surgery.

CECOM

LT Sandy Baggett arrived at CECOM 22 December 1997. She arrived from the Basic Course in Charlottesville, VA, and will serve with the Military Law Branch of the Staff Judge Advocate Division.

IOC

Captain Eugene Baime, and his wife Angie arrived in January to work in the Environmental area.

Stephanie Ringstaff, a Senior at Sherrard HS joined the office as a coop student.

A college paralegal intern **Amy DePau** joined the staff as part of her paralegal program requirements and will be interning in the office.

Mrs. JoAnn Lieving has joined the office as a Legal Assistant in the Acquisition Law area. JoAnn and her husband have one daughter and are expecting another child in February. Great to have you with us JoAnn!

Promotions

ARL

Effective 7 Dec 97, **Mr. Paul S. Clohan** was promoted to a GS-15, as the Chief, Intellectual Property Law Branch and **Ms. Angee K. Acton** was promoted to a GS-11 (Target GS-12) Paralegal Specialist position.

Effective 18 Jan 98, **Ms. Tina D. Shaner** was promoted to a GS-07, Legal Assistant position.

IOC

Ms. Martha Morris, Legal Assistant at McAlester Army Ammunition Plant, has been promoted. Martha's temporary promotion recently became permanent.

CECOM

Pat Terranova was promoted to chief of Business Law Division C, GS 905-15.

Jim Scuro was promoted from GS 905-13 to GS 905-14.

Maria Esparraguera was promoted from GS 905-13 to GS 905-14.

Faces In The Firm

Departures

AMCOM

ATCOM personnel who did not relocate to Alabama: **James H. Casey**, **Leonard E. Glaser** and **Carol P. Rosenbaum** decided to take a much earned retirement. **Robert C. Arendes, Jr.** has taken an attorney position with Social Security in St. Louis. **Stephanie A. Kreis** transferred to Defense Information Technology Contracting Organization (DITCO) at Scott Air Force Base. **John H. Lamming** is now with Washington University and is the first patent attorney there. **Michael L. Lissek** is an Administrative Law Judge for Social Security in New York City. **Jeffrey Asbed** and **Louise Ryterski** are now in private practice. **Anne Wright**, Claims Examiner, is working with United Van Lines in St. Louis.

Juan B. Gerala retired on 2 January 1998 after over 37 years of government service.

Peggy K. Anderson will retire from this office on 1 April 1998.

WSMR

CPT Frances Martellacci will PCS to Korea in February.

SGT James Mersfelder was deployed to Bosnia for six months.

TACOM-ARDEC

Bob McQuillan, Chief of the General Law Division, TACOM-ARDEC Legal Office, retired January 3rd, 1998, after 30 years of government service. Bob worked most of the time at Picatinny Arsenal with a short stint at Fort Monmouth. At a recent luncheon, he was overheard stating that he has never been happier and is looking forward to spending most of his time with his first grandchild who is expected in the next few months.

HQAMC

Elizabeth Buchanan has accepted a position with the DA Office of General Counsel, focusing in Fiscal Law and Ethics. Best of Luck!

IOC

Mrs. Stacy Johnson took advantage of the most recent VERA/VSIP and left Government service. She is now a stay-at-home mother. Stacy and her husband have two daughters, ages 12 and 3. Best of luck to Stacy.

Awards

TACOM-ARDEC

Martin I. Kane and **Denise C. Scott**, both received TACOM-ARDEC Technical Director's Technology Transfer Awards. Mr. Kane was recognized for his precedent setting M831A1 training round technology transfer license, while Ms. Scott was recognized for her continued exceptional support to the TACOM-ARDEC technology transfer program.

ARL

Kenneth J. Spitza and **Alvin E. Prather**, received a Time Off Award and a Certificate of Achievement for outstanding legal support to the Non-Appropriated Fund Instrumentality Council (NAFIC).

CECOM

Received at the CECOM awards ceremony 30 January 1998 were:

Howard Bookman received the DA Certificate of Achievement for his contribution to the LOGCAP project.

Mark Sagan received the Commander's Award for CECOM leadership in the executive category. He also received the CECOM bronze eagle and a \$1000 US Bond.

Mike Zelenka received honorable mention for the same award.